STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL CASTELLO,

Defendant-Appellant.

UNPUBLISHED
February 5, 2004

No. 243361
Wayne Circuit Court
LC No. 99-01326-01

Before: Fort Hood, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant appeals as of right. We affirm.

This case arises from the armed assault of off-duty Detroit police officer Isam Qasem and his companion, Laura Phillips. Defendant, who was apprehended a short-distance from the scene of the assault, was arrested and ultimately charged with the instant offenses after being identified by Qasem at the scene of his apprehension. Before trial, defendant unsuccessfully moved to suppress the on-the-scene identification, as well as two subsequent photo array identifications, on the ground that the on-the-scene identification was both impermissible and unduly suggestive. On appeal, defendant argues that the trial court clearly erred in denying this motion. See *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). We disagree.

Although challenged below, the permissibility of on-the-scene identifications such as that at issue here is not disputed by defendant on appeal.[1] Indeed, as this Court observed in *People v Winters*, 225 Mich App 718, 727; 571 NW2d 764 (1998):

> Such on-the-scene confrontations are reasonable, indeed indispensable, police practices because they permit the police to immediately decide whether there is a

[1] Because defendant concedes the permissibility of a prompt, on-the-scene identification, we need not address his contention that the trial court incorrectly determined that the confrontation at issue here was "inadvertent." As noted by the trial court, whether purposeful or inadvertent there was nothing improper in the fact of the confrontation.

> reasonable likelihood that the suspect is connected with the crime and subject to arrest, or merely an unfortunate victim of circumstance. Whatever the perceived problems of on-the-scene confrontations, it appears to us that prompt confrontations will, if anything, promote fairness by assuring greater reliability.

In so reasoning, however, the *Winters* Court recognized that defendants still have an independent constitutional basis for challenging identification procedures "that are so unnecessarily suggestive and conducive to mistaken identification that they amount to a denial of due process." *Id*. at 725, citing *Stovall v Denno*, 388 US 293; 87 S Ct 1967; 18 L Ed 2d 1199 (1967). In order to sustain such a challenge, "a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *Kurylczyk*, *supra* at 302-303. Here, defendant argues that the totality of the circumstances surrounding Qasem's on-the-scene identification were so unduly suggestive as to deny him due process because (1) Qasem was "predisposed" to identify defendant after being told by police that he was being taken to an area where a suspect had been apprehended, and (2) when Qasem arrived, he found defendant seated in the back of a patrol car, handcuffed and surrounded by police officers. Defendant further argues that the unduly suggestive nature of the on-the-scene identification tainted both Qasem's and Phillips' later identifications at the photo array, such that the trial court was required to suppress any evidence of the identifications at trial. We do not agree.

When examining the totality of the circumstances surrounding a pretrial identification, factors relevant to a determination of the likelihood of misidentification include: "the opportunity for the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of a prior description, the witness' level of certainty at the pretrial identification procedure, and the length of time between the crime and the confrontation." *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998), citing *Kurylczk*, *supra* at 306. Analyzing the relevant factors in this case, we hold that the trial court did not clearly err in declining to suppress evidence of the challenged identifications at trial.

First, testimony offered at the suppression hearing indicated that less than one hour had passed between the time of the offense and Qasem's on-the-scene identification of defendant, who matched Qasem's description of his attacker as a white male dressed all in black, and was apprehended following a foot-chase only one-eighth of a mile from the scene of the crime. Second, Qasem testified that he had the opportunity to view defendant's face from distances of between two and seven feet during the five-minute long confrontation with defendant, which included a brief, face-to-face conversation. Qasem further testified that during a portion of this time he intently studied defendant's face so that he could "point him out in a lineup," if not killed during the assault. Furthermore, testimony offered by several witnesses at the suppression hearing indicated that Qasem's on-the-scene identification was made without hesitation or deliberation, immediately upon seeing defendant at the scene and without being asked by police to make the identification.[2] While the circumstances cited by defendant, i.e., his being seated

[2] Although competing testimony concerning the purpose for bringing Qasem and Phillips to the scene was offered at the suppression hearing, nothing in the testimony offered below contradicts that neither Qasem nor Phillips were expressly asked to identify defendant at the scene, or that
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handcuffed in the rear of a patrol car at the time he was identified, may have been somewhat suggestive, "a suggestive [identification procedure] is not necessarily a constitutionally defective one." *Kurylczk*, *supra*. Rather, "a suggestive [identification procedure] is improper only if under the totality of the circumstances there is a substantial likelihood of misidentification." *Id*. Here, given the relatively short time period between the assault and identification, as well as Qasem's purposeful opportunity to view and study his assailant during the attack for the express purpose of later identification, we find no such likelihood of misidentification. Accordingly, neither the on-the-scene identification nor the subsequent identifications at the photo arrays need have been suppressed. *Id*.

Furthermore, there is nothing to indicate that either of the complainants' later identifications of defendant were even influenced, let alone "tainted," by Qasem's on-the-scene identification. Qasem expressly testified at the suppression hearing that his identification of defendant at the photo array was based on "what happened," and that his in-court identification was based on "[t]he five minutes that I was watching [defendant] when he had the shotgun pointed at me." Moreover, Phillips specifically testified that she did not see the person identified by Qasem in the back of the patrol car because her attention was elsewhere. The trial court did not clearly err in denying defendant's motion to suppress.

We affirm.

/s/ Karen Fort Hood
/s/ Richard A. Bandstra
/s/ Patrick M. Meter

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the identification was spontaneously and unilaterally made by Qasem as he passed the patrol car in which defendant was being held.